Supreme Court, U.S.
FILED
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No.

In The

Supreme Court of the United States

GILBERT M. GRAHAM

Petitioner,

v.

JOHN D. ASHCROFT, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United States Court of Appeals for the District of Columbia has held that the Civil Service Reform Act of 1978 ("CSRA") precludes judicial review of petitioner's claim that the Federal Bureau of Investigation ("FBI") violated its own regulations in taking personnel action against petitioner. The district court therefore had no subject matter jurisdiction over petitioner's *Vitarelli* claim. The panel that initially heard the appeal held that the district court properly dismissed petitioner's equal protection claim in light of *Brown v. General Services Administration*, 425 U.S. 820 (1976). This holding raises three substantial questions that warrant review by this Court:

1. Whether petitioner may obtain judicial review of colorable constitutional claims under the general federal question, 28 U.S.C. 1331.

2. Whether, under the principles enunciated in *Vitarelli v. Seaton*, that the CSRA precludes judicial review where the FBI violated its own regulations.

3. Whether Title VII of the Civil Rights Act of 1964 precludes judicial review of an alleged violation of the Equal Protection Clause of the Fifth Amendment.

PARTIES TO THE PROCEEDING

Petitioner, Gilbert M. Graham was the plaintiff in the district court and the appellant in the court of appeals. He brings this action on his own behalf.

Respondent, United States Attorney General, John D. Ashcroft was the defendant in the district court and appellee in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. Because this Court has sustained the "right of every citizen to require that the government be administered according to law," the appeals court's decision involves issues of national importance.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 358 F. 3d 931. The court of appeals' order denying petition for rehearing (Pet. App. 24a) is not reported. The opinion of the district court (Pet. App. 13a) is reported at 2002 WL 32511002.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 2004. A petition for rehearing was filed on April 7, 2004, and denied on April 30, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment of the Constitution provides that "[n]o person shall be . . .deprived of life , liberty, or property, without due process of law . . . ."

2. The Equal Protection Clause of the Fifth Amendment of the Constitution provides, in pertinent part, that

no government actor shall "deny to any person within its jurisdiction the equal protection of the law."

3. Pursuant to 28 U.S.C. 1331, federal courts shall have original jurisdiction over "all civil actions under the Constitution, laws, or treaties of the United States."

4. The National Foreign Intelligence Program Manual ("NFIPM"), Part I, Section 6-7.4.2., provides, in pertinent part, that all potential Intelligence Oversight Board ("IOB") matters detected by FBI field divisions are to be reported to the FBI, Inspection Management Unit within 14 days of discovery of the possible violation. The report should be captioned with the names of the involved employees, to include supervisors[1].

5. The Manual of Administrative and Operational Procedures ("MAOP"), Part I, Section 13.5 (e) provides, in pertinent part, that if the FBI Inspection Division or Division Review Board finds that an employee has not received the procedural protections in the disciplinary process to which he is entitled, it may retain the matter for decision, e.g., when the matter involves harmless error, may refer the matter back to the Office of Professional Responsibility ("OPR") for corrective action; or may reverse or modify the action of the deciding official.

6. The MAOP, Part I, Section 14-1 provides, in pertinent part, that the FBI has always attempted to anticipate and avoid possible sources of employee discontent or grievance

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[1] Since the National Foreign Intelligence Program Manual is a classified document, relevant portions included in the Appendix filed with this petition were disseminated in an unclassified electronic communication dated July 10, 2000.

by following fair and objective policies, uniformly applied to all. To detect and solve grievances which might arise, the FBI depends upon the alertness of its supervisors and officials.

STATEMENT OF THE CASE

This case is about the vindictive and ultra vires reporting of a potential IOB violation involving an electronic surveillance ("ELSUR") operation targeting a hostile intelligence service. On April 14, 1999, the FBI, Washington Field Division reported that petitioner had improperly requested ELSUR coverage on three telephone lines that had not been authorized by the Foreign Intelligence Surveillance Court. Upon discovery of this harmless error, an FBI Telecommunications Technician immediately discontinued the preliminary phase of the ELSUR operation. A subsequent computer analysis determined that no information had been monitored or accessed by FBI employees. Notwithstanding the inadvertent administrative oversight that resulted in a harmless error, in conjunction with the fact that the three telephone lines were subscribed to by foreign diplomatic officials who were suspected of conducting intelligence operations against the United States, petitioner was alleged to have engaged in investigative dereliction, resulting in a violation of IOB requirements.

The FBI ignored the fact that no information had been accessed or monitored by any employees. Prior to reviewing petitioner's signed, sworn statement consisting of substantial mitigating facts, a gratuitous OPR investigation was initiated, resulting in an unlawful administrative sanction. Even assuming that petitioner's actions were intentional or conscious neglect, the FBI violated its own rules in reporting and investigating an alleged IOB matter, and in so doing, violated petitioner's constitutional rights.

I. Factual Background

A. Petitioner

Petitioner, Gilbert M. Graham is an African American, who began his career as a Special Agent on August 13, 1978. Regarding the alleged IOB violation, the FBI admitted that none of the employees under investigation intentionally through investigative action or inaction violated IOB requirements. (Reply Brief, Ap. 6[2]). The FBI also admitted that the administrative inquiries were initiated and processed outside the protections established by OPR and outside the IOB process. (Ap. 7) (citing to comments of FBI, Acting Assistant Director, James T. Caruso, concerning IOB matters). After twenty-five years of dedicated service, petitioner retired on September 3, 2003.

B. FBI Policy Concerning IOB Violations

Pursuant to the NFIPM, Part I, Section 6-7.4.2., IOB reports must contain a complete synopsis of the possible violation, including: (1) clearly defining the questioned activity; (2) the date of the activity; (3) the date of discovery; (4) the involved employees explanations; and (5) recommendations for administrative action from the division head.

C. The FBI's Violation Of Its Policies.

In reporting the alleged IOB violation involving

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[2] Citations herein, other than to the Appendix filed with this petition are to record documents contained in the Appellant's Reply Brief cited as "Ap." followed by the page number.

petitioner, the FBI violated its policies in the following manner: (1) all Caucasian employees involved in this matter were not reported; (2) an African American employee who was not involved was reported; (3) petitioner was prohibited from submitting an explanatory statement with the report; (4) division head comments were not submitted with the report; (5) Caucasian employees who were not involved provided an explanatory statement; (6) OPR violated the established procedural protections, and (7) the FBI was neither fair nor objective in the administrative proceeding.

II. Proceedings Below

This action originated based on the FBI's stubborn refusal to accept the fact that petitioner's inadvertent administrative oversight did not rise to the level of investigative dereliction, resulting in a violation of IOB requirements. The FBI determined that based on a preponderance of the evidence and relevant disciplinary policy and precedent, petitioner's actions did not warrant a three day suspension from duty, without pay. Nevertheless, while performing his investigative and administrative duties under extraordinary circumstances, petitioner was unlawfully sanctioned with the issuance of a letter of censure. Following the administrative appeal process, on June 21, 2002, a civil complaint was filed invoking the district court's federal question jurisdiction. Based on the premise that the FBI had violated its own rules, the complaint alleged a violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, and the Fifth Amendment of the Constitution.

A. The District Court

On November 20, 2002, the district court dismissed this case, thwarting one of the hallmarks of the American

administrative law system – the presumption of judicial review of agency action. The court's dismissal contravenes this Court's statement that "the APA's generous review provision must be given a hospitable interpretation." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967). Irrespective of the presumption of judicial review and the proper interpretation of the abuse of discretion standard, the district court concluded that the CSRA's comprehensive scheme barred the court from reaching the merits of petitioner's APA claim. (Pet. App. 18a). The court reached this conclusion in the absence of reviewing the administrative record documenting the challenged action. Therefore the court's opinion was not based on any evidentiary factors from which to make the appropriate factual and legal determination as to: (1) whether the FBI acted within the scope of its authority; (2) whether the FBI complied with prescribed procedures; and (3) whether the action is otherwise, arbitrary, capricious or an abuse of discretion. *Olenhouse v. Commodity Credit Corp.*, 42 F. 3d 1574 (10th Circuit 1994).

Conversely, the district court held that petitioner's constitutional challenges to the FBI's actions stand on a different footing. The court noted that the law in this circuit generally allows employees to seek equitable relief against their employers for alleged constitutional violations, even where similar statutory claims would be barred. *Spagnola v. Mathis*, 859 F. 2d 223, 229-30 & n. 12 (D.C. Cir. 1988). (Pet. App. 18a). In spite of the precedential value of *Spagnola* where this circuit held that the CSRA is not the exclusive remedy for federal employees for all employment wrongs, the district court determined that petitioner could not obtain judicial review of his due process claim.

Although petitioner could have demonstrated the deprivation of a protected interest, the court dismissed this case

prior to giving any consideration to an important statement from this Court, that "[d]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Based on these principles, this Court developed a three factor balancing test to determine what type of process is due before the government can deprive a person or entity of a protected interest. Contrary to the principles established by this Court to determine what process is due, the district court restricted petitioner's protected liberty interest to harm done to his reputation. The court determined that since there was neither loss of pay or benefits, no constitutionally protected liberty interest was implicated by the FBI's actions. (Pet. App. 20a). Even if petitioner did not have due process rights apart from those which the agency created by its own regulations, "designed to benefit aggrieved employees during administrative proceedings," the court concluded that his constitutional claim could not prevail, "because it is clear that he received all of the process due him under the Fifth Amendment." (Pet. App. 21a).

Concerning the equal protection claim, the district court held that this claim was not precluded by the CSRA, but is foreclosed by another federal statute: Title VII. The court annulled this constitutional safeguard by gratuitously asserting that "plaintiff is unquestionably seeking to redress the violation of rights guaranteed by the statute, and as such, Title VII provides the exclusive basis for that claim." (Pet. App. 23a).

B. The Court of Appeals

On August 5, 2003, the Court of Appeals for the District of Columbia Circuit affirmed the dismissal of the constitutional claims and held that petitioner had no general right of review under the APA. Because summary disposition was not in order with respect to the *Vitarelli* claim, this case

was presented to a merits panel, with oral argument scheduled for January 13, 2004.

On February 24, 2004, the panel held that the CSRA precludes judicial review of claims that the FBI violated its own regulations in taking personnel action against petitioner. In concert with respondents' argument that the basic premise of this case involved a minor personnel action, the appeals court reasoned that "it is no answer to invoke the principle that agencies must follow their own regulations. That was, after all, the assertion in *United States v. Fausto*, 484 U.S. 439 (1988), [where] the Court held that it was trumped by the proposition that agencies cannot purport to confer rights undermining a comprehensive congressional scheme." (Pet. App. 10a).

The appeals court also relied on *Carducci,* where it previously interpreted that the CSRA precludes judicial review for specified minor personnel actions not infected by "particular heinous motivations or disregard of law." The court included in this category non-constitutional claims that were "relatively minor both in their substantive effect and in the malevolence of their motivation." *Carducci v. Reagan*, 714 F. 2d 171, 175 (D.C. Cir. 1983). Unlike *Carducci*, this case involves unconstitutional personnel actions invidiously motivated for reasons wholly beyond any legitimate government objective. The court stated that *Fausto* is not "directly on point," but was not persuaded by petitioner's argument that cases like *Fausto* and *Carducci* are completely unavailing here, where it is alleged that the FBI violated his constitutional rights. Even if the CSRA precludes judicial review concerning minor personnel actions, this Court determined that review is available where agency actions violate the procedural protections guaranteed in its own regulations. *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959).

On April 30, 2004, the court of appeals denied petitioner's request for rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

This case presents important issues of fundamental national importance, which were resolved erroneously by the court of appeals. The court's decision contravenes the requirements of federal law and is inconsistent with its previous decisions. The court's decision also conflicts with this Court's precedent concerning the right of federal employees to obtain judicial review of constitutional claims. It is a compelling reason to grant this petition, as the court of appeals has entered a decision that is in conflict with other United States courts of appeals on an important matter. Sup. Ct. R. 10(a).

If review is declined, the observance of procedural safeguards shall be rendered ineffectual, and "otherwise the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual." *American School of Magnetic Healing v. McAnnulty*, 187 U.S. 108, 110 (1902).

I. Review Is Warranted Because The Court Of Appeals Disregarded Federal Law Governing Original Jurisdiction Over Petitioner's Constitutional Claim.

The appeals court previously stated that "if there is any foundation of plausibility to a claim, federal jurisdiction exists." *Payne v. Government of D.C.*, 559 F. 2d 809, 823 (D.C. Cir. 1977). In this instance, the court's inconsistent decision determined that petitioner's *Vitarelli* claim was precluded by the CSRA, therefore was not judicially cognizable.

In *Griffith v. FLRA*, 842 F. 2d 487 (D.C. Cir. 1988), the appeals court held that the CSRA remedial scheme did not preclude the plaintiff from pursuing judicial review of a constitutional challenge. Looking to the language and legislative history of the CSRA in light of the principle that congressional preclusion of judicial review must be clear and convincing, the court concluded from the absence of an express preclusion in the statute, or any other basis upon which to infer preclusion, that review of plaintiff's constitutional claim was permissible. Prior to *Griffith*, the appeals court held that "Congress intended the CSRA to provide additional, not decreased, protection for employees who blow the whistle on illegal or improper government conduct." *Borrell v. U.S. International Communications Agency*, 682 F. 2d 981, 990 (D.C. Cir. 1982)(CSRA does not supplant judicially-created remedies for constitutional violations)(citing legislative history).

In *Spagnola* (supra), the appeals court commented: "[W]e do not suggest that the CSRA precludes the exercise of federal jurisdiction over the constitutional claims of federal employees and job applicants altogether . . . . On the contrary, time and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of constitutional rights." *Hubbard v. EPA*, 809 F. 2d 1, 11 (D.C. Cir. 1986); *Williams v. IRS*, 745 F. 2d 702, 705 (D.C. Cir. 1984).

This Court has determined that it cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers. The Court held that the courts had jurisdiction to enjoin an administrative officer from acting unlawfully, noting that "acts of all [a government department's] officers must be justified by some law, and in case an official violates the law to

the injury of an individual the courts generally have jurisdiction to grant relief." *American School of Magnetic Healing*, 187 U.S. 94, 108, 110.

In *Bell v. Hood*, 327 U.S. 678, 681 (1946), this Court instructed that before dismissing a case for lack of jurisdiction, the district court must look to the complaint to ascertain how plaintiff, as "master to decide what law he will rely upon," defines the claim. *Id.* at 681. The Court ruled that where, as here, a complaint is "so drawn as to seek recovery directly under the Constitution or laws of the United States" the court must assume jurisdiction under 28 U.S.C. 1331. *Id.* Dismissal is appropriate only if the federal claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Id.* at 682-683.

Petitioner's complaint alleged that the FBI's reporting and investigation of a potential IOB matter was conducted in violation of its regulations. The complaint further alleged that the FBI violated petitioner's Fifth Amendment rights, and was arbitrary and capricious within the meaning of the APA. Since there can be little doubt that the FBI's failure to abide by its own regulations can be a violation of procedural due process, petitioner's constitutional claim is, indeed, colorable. Unless the appeals court had determined that this claim was made solely to obtain jurisdiction, and was "wholly insubstantial and frivolous" as to warrant dismissal for want of jurisdiction, the court's decision is otherwise erroneous.

Given the importance of this issue, this Court should clarify congressional intent when it directed that all federal controversies are cognizable within the jurisdiction of district courts under 28 U.S.C. 1331. If such is the case, then the judgment below must be reversed.

II. Review Is Warranted Because The Court Of Appeals Decision Conflicts With This Court's Precedent Concerning Judicial Review Of Constitutional Claims.

This Court has consistently demanded government compliance with regulations designed to safeguard individual interests even when the rules were not mandated by the Constitution or federal statute. In a long line of cases beginning with *Bridges v. Wixon*, 326 U.S. 135, 152-53 (1945), this Court has held that "one under investigation . . . is legally entitled to insist upon the observance of rules promulgated by an executive or legislative body for his protection." *United States v. Nixon*, 418 U.S. 683, 695-96 (1974); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *Yellin v. United States*, 374 U.S. 109 (1963); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

More definitive still is this Court's decision in *Webster v. Doe*, 486 U.S. 592, 602-05 (1988), where it addressed whether employment decisions by the Director of the Central Intelligence Agency ("CIA") were subject to judicial review. In *Webster*, plaintiff Doe was discharged after informing the agency that he was a homosexual. He contested his termination partly on constitutional grounds. The court held that the termination of employees was committed to agency discretion by law and that judicial review of those decisions was precluded under § 701(a)(2) of the APA. However, this Court clarified that such a holding did not preclude review of constitutional claims, noting that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear . . . . We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* at 603.

Contrary to *Webster*, the appeals court adopted the proposition that the CSRA precludes judicial review of petitioner's *Vitarelli* claim. Because the court's decision "conflicts with [a] relevant decision [] of this Court," review is warranted. As Justice Scalia stated in *Reed v. Collyer*, 487 U.S. 1225 (1988), "[i]f we adhere to the rationale of *Webster*, we should certainly grant this petition for certiorari, vacate the judgment of the [D.C. Circuit], and remand this case for reconsideration in light of *Webster*." (SCALIA, J., dissenting).

III. Review Is Warranted Because The Circuit Courts Are Divided On Whether Statutory Schemes Such As Title VII Forecloses Constitutional Claims.

It is well settled precedent that a cause of action may be implied directly under the Equal Protection Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right. *Bell v. Hood*, 327 U.S. 678, 684 (1946); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

In *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25, 33 S. Ct. 410, 411 (1913), this Court stated: ". . . the party who brings a suit is master to decide what law he will rely upon, and . . . does determine whether he will bring a suit arising under the . . . (Constitution or laws) of the United States by his declaration or bill." Accordingly, this case was brought in the context of the FBI's violation of petitioner's right to equal protection of the law. The complaint alleged, *inter alia*, that the FBI failed to report all Caucasian employees involved in the IOB matter. The FBI's violation of a facially neutral policy was motivated by discriminatory animus and its application resulted in a discriminatory effect. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-65 (1977). Although the FBI was not required to provide any explanation for its actions, it has long

been recognized that when the government treats two classes of citizens differently under the law, the government must demonstrate that such treatment is at least rationally related to a legitimate government purpose. *City of Cleburne v. Cleburne Living Center, Inc.* 473 U.S. 432, 440 (1985); *Plyer v. Doe*, 457 U.S. 202, 216 (1982).

Under the proposition of the Fifth Amendment, any person, of whatever race, has the right to demand that any government actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest scrutiny. This Court stated that "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273-74 (1986).

The courts below disregarded the requirement to conduct judicial review and dismissed the equal protection claim by asserting that such claims are an attempt to evade "the rigorous administrative exhaustion requirements and time limitations of Section 717 of Title VII." In applying the rationale of *Brown* (supra), the district court held that "[a]llowing federal employees to recast their Title VII claims as constitutional claims would clearly threaten those same policies." *Id.* at 820. The court's assertion implies that the equal protection claim was not properly framed and that petitioner engaged in artful pleading to recast a claim of federal employment discrimination as a constitutional challenge. Contrary to the court's presumptive opinion, it was not petitioner's intent to file a timely complaint under 717(c). As this Court held in *Brown*, unless petitioner had failed to file a timely complaint under 717(c), the district court's dismissal of his equal protection claim is improper.

The appeals court's decision to affirm dismissal of this claim conflicts with other circuits where there is general agreement that door-closing statutes, e.g., Title VII, do not, unless Congress expressly provides, close the door to constitutional claims, provided that the claim is colorable and the plaintiff is seeking only a new hearing or other process rather than a direct award of money by the district courts. *Czerkies v. Department of Labor*, 73 F. 3d 1435, 1440 (7th Cir. 1996)("Each statute must stand on its own two feet, but each is informed by the presumption . . . against slamming the courthouse door in the face of holders of constitutional claims.") *Marozsan v. United States*, 852 F. 2d 1469 (7th Cir. 1988).

In *Keller v. Prince George's County*, 827 F. 2d 952, 957 (4th Cir. 1987), the question was considered "whether Congress intended in adopting § 2 of the Equal Employment Opportunity Act of 1972 to make Title VII the exclusive remedy for public sector employment discrimination in violation of constitutional safeguards." After observing that Title VII was silent on the question and that the legislative history indicated that it was not so intended, the fourth circuit held that Title VII does not preclude a public sector employee from bringing a § 1983 action based on alleged violations of the Equal Protection Clause. Although *Keller* involves the public sector, this Court held in *Bolling* that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it does on a State to afford equal protection of the laws. 347 U.S. 497, 500.

Additionally, other circuits have concluded that unless, and perhaps even if, Congress has acted with particular clarity to shut off review, a cause of action remains available under the Constitution. *Mitchum v. Hurt,* 73 F. 3d 30, 34-35 (3rd Cir. 1996). An important principle to observe is that all government

action based on race . . . should be subjected to a detailed judicial inquiry to ensure that the personal right to equal protection has not been infringed.

In this case, the courts below slammed the courthouse door on petitioner's constitutional claim, nullifying the equal protection mandate of the Fifth Amendment. Therefore this Court's review is warranted to determine whether petitioner has the constitutional right to be protected from the FBI's purposeful unequal treatment. Review is also warranted to determine if the Constitution may require some forum for review of cases involving discrimination, as opposed to a statutory scheme such as Title VII. *Webster* suggests that the Constitution may require an avenue of judicial review for equitable constitutional claims, regardless of any statutory provision to the contrary.

CONCLUSION

For the foregoing reasons, petitioner respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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Petitioner Pro Se

July 13, 2004

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 13, 2004 Decided February 24, 2004

No. 03-5025

GILBERT M. GRAHAM,
APPELLANT

V.

JOHN D. ASHCROFT, IN HIS OFFICIAL CAPACITY AS U.S. ATTORNEY GENERAL, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 02cv01231)

Gilbert M. Graham, appearing *pro se,* argued the cause and filed the briefs for appellant.

Sherri Evans Harris, Assistant U.S. Attorney, argued the cause for appellees. With her on the brief were *Roscoe C. Howard, Jr., U.S.* Attorney, and *R. Craig Lawrence,* Assistant U.S. Attorney.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: EDWARDS and ROBERTS, *Circuit Judges,* and WILLIAMS, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge* ROBERTS.

ROBERTS, *Circuit Judge:* Appellant Gilbert Graham, at the time a Special Agent with the Federal Bureau of Investigation, alleges that the Bureau violated its own regulations in the course of censuring him for alleged irregularities in a surveillance operation. We hold that the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.), precludes judicial review of Graham's claim, and accordingly affirm the district court's dismissal of his action.

1. Background

Graham was a Special Agent in the FBI's Washington Field Office who had responsibility for managing a surveillance operation. In April 1999, another Special Agent reported a potential Intelligence Oversight Board (IOB) violation involving Graham and others to the Inspection Management Unit. The IOB, a standing committee of the President's Foreign Intelligence Advisory Board, investigates and reports on intelligence activities that may be unlawful or contrary to executive order. Exec. Order No. 12,863, 58 Fed. Reg. **48,441, 48,442** (Sept. 13, 1993). The report of a possible IOB violation triggered an inquiry by the FBI's Office of Professional Responsibility (OPR) to determine whether Graham was guilty of investigative dereliction. In the course of that inquiry, Graham was notified of the allegation against him and afforded an opportunity to submit a sworn statement.

OPR eventually concluded that Graham had violated IOB requirements, and suspended him without pay for three days. Graham appealed to the Inspection Division, which noted that Graham was "a 24-year veteran of the Bureau with a good service record and no prior disciplinary sanctions" who immediately notified his superiors of the IOB violation, allowing corrective action to be taken to rectify the situation and avoid any detrimental effects. Letter from Thomas Locke, Inspection Division, to Graham (May 22, 2002) at 2.

The Inspection Division reduced Graham's suspension to a letter of censure, with no loss of pay or benefits. Graham, however, remained unsatisfied. He sued the Attorney General and the Director of the FBI in their official capacities (collectively the FBI), challenging the FBI's actions during the investigation of the IOB violation and the ensuing disciplinary process. He alleged that the FBI violated the Administrative Procedure Act, failed to abide by its own internal procedures and regulations, denied him procedural due process, and violated his equal protection rights by discriminating against him on grounds of race.

The FBI moved to dismiss the claims for lack of subject matter jurisdiction and for failure to state a claim. In his memorandum opposing the motion, Graham asserted, *inter alia,* that the FBI "must adhere to voluntarily adopted, binding polic[i]es that limit its discretion," citing *Vitarelli v. Seaton,* 369 U.S. 535, 539 (1959). Pl. Mem. Opp. Mot. Dismiss at 5. In *Vitarelli,* the Supreme Court held that even agencies with broad discretion must adhere to internally promulgated regulations limiting the exercise of that discretion. 359 U.S. at 539-40; *see Padula v. Webster,* 822 F.2d 97, 100 (D.C. Cir. 1987) ("It is well settled that an agency, even one that enjoys broad discretion, must adhere to voluntarily adopted, binding policies that limit its

discretion."). Graham's contention was that the FBI had violated its own internal regulations and procedures governing how to handle alleged IOB transgressions and any resulting disciplinary process. Although Graham was afforded notice and an opportunity to submit a statement prior to being disciplined, he contends that the FBI's internal rules promised him earlier notice and an opportunity to respond, and that, had he been given the procedural protections allegedly required, he would have been able to forestall even the letter of censure.

The district court disposed of the entire action. That court found that it lacked subject matter jurisdiction over Graham's APA claims, because the CSRA precludes review under the APA of employment-related decisions. Next, the district court dismissed the due process claims, holding that Graham failed to demonstrate the deprivation of a constitutionally protected interest, and that he received in any event all the process due under the Fifth Amendment. The court also dismissed Graham's equal protection claim, explaining that Title VII is the exclusive remedy for a federal employee claiming racial discrimination.

Graham appealed to this court. We summarily affirmed the district court's dismissal of his constitutional and APA claims. *Graham v. Ashcroft*, No. 03-5025, slip op. at 1, 2003 WL 21939757, at *1 (D.C. Cir. Aug. 5, 2003). This court declined, however, to summarily affirm the dismissal of what was identified as Graham's separate *Vitarelli* claim - the contention that, quite apart from the Constitution or the APA, the Bureau was required to follow its own internal regulations voluntarily adopted to circumscribe its discretion, but had failed to do so. *Id.* Only that claim is now at issue.

II. Analysis

The FBI contends that the CSRA "provides the exclusive remedy for a federal employee to challenge an agency's disciplinary decision" - thereby precluding any judicial review of alleged procedural violations under *Vitarelli*. Appellees' Br. at 9. The CSRA provides a comprehensive scheme to administer adverse personnel actions against federal employees. See *Lindahl v. OPM*, 470 U.S. 768, 773-74 (1985). "It prescribes in great detail the protections and remedies applicable to such action[s], including the availability of judicial review." United States v. Fausto, 484 U.S. 439, 443 (1988). Chapter 75 of the CSRA governs adverse personnel actions based on misconduct: Subchapter 1, 5 U.S.C. §§ 7501-7504, governs minor adverse personnel actions and Subchapter II, 5 U.S.C. §§ 7511-7514, governs major adverse personnel actions. Subchapter I defines a minor personnel action as suspension for 14 days or less, § 7502, and applies only to employees in the "competitive service," § 7501. Although Section 7503 provides some procedural protections in such cases, there is no right to judicial review for covered employees under Subchapter I.

Subchapter II governs major adverse personnel actions, defined as removal, suspension for more than 14 days, reduction in grade or pay, or furlough for 30 days or less. § 7512. Employees covered by Subchapter II are entitled to administrative review by the Merit Systems Protection Board (MSPB), and subsequent judicial review in the Court of Appeals for the Federal Circuit. H 7513(d), 7701, 7703. Although FBI employees are generally excluded from CSRA provisions, *see §§* 2302(a)(2)(C)(ii), 7511(b)(8), Subchapter II does apply to "preference eligible" FBI employees. § 7511(a)(1)(B). Such "preference eligible"

employees are entitled to specified protections under the CSRA because of prior military service. *See* § 2108(3).

The foregoing statutory scheme does not provide Graham a right to judicial review in the present circumstances. Although Graham may claim the protections of Subchapter II because of his status as a "preference eligible" employee,[1] the adverse personnel action in this case - a letter of censure - fails to qualify as a major adverse personnel action under Section 7512. (Indeed, it does not even qualify as a minor adverse personnel action under Subchapter I.) Graham accordingly is not entitled to administrative and judicial review of this action under the CSRA. *See §§* 7512, 7513(d), 7703(a)(1).

The consequences of the lack of availability of relief under the CSRA for government employees seeking to challenge employment actions through other avenues were spelled out by the Supreme Court in *Fausto*. In that case, a government employee - whose status gave him no right to administrative or judicial review under the CSRA - sought judicial review of his removal from government service under the Back Pay Act, contending that his dismissal had violated regulations issued by his employing agency. *See* 484 U.S. at 441-43 & n.2. The Supreme Court held that the comprehensive framework of the CSRA precluded judicial review under the Back Pay Act:

> The CSRA established a comprehensive system for reviewing personnel action taken against federal employees. Its deliberate exclusion of employees in respondent's service category from the provisions

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[1] Although Graham failed to allege that he is preference eligible in his complaint, he did claim that status in his memorandum opposing the FBIs motion to dismiss. Def. reply to Pl. Opp. Mot. Dismiss at 3 n. 3.

> establishing administrative and judicial review for personnel action of the sort at issue here prevents respondent from seeking review ... under the Back Pay Act. *Id.* at 455.

The Court explained that allowing direct judicial review of employment claims for employees with no rights under the CSRA would provide them a more substantial right to review than was available to personnel granted a right to judicial review under the CSRA; such personnel had to first seek administrative review by the MSPB before gaining judicial review in the Federal Circuit. *See Id.* at 448-50. Direct judicial review would also undermine "the development, through the MSPB, or a unitary and consistent Executive Branch position on matters involving personnel action," and would frustrate congressional intent in the CSRA to "avoid[ ] an unnecessary layer of judicial review in lower federal courts." *Id.* at 449.

Fausto is not directly on point. It involved a "type of personnel action covered by [the CSRA]," *Id.* at 448 - removal - as to which some employees were given judicial review rights and some (like *Fausto*) were not. The Court reasoned that in not granting review to *some* employees under the CSRA for actions covered by the CSRA, Congress meant to preclude those employees from securing review under other avenues. The present case involves an employee granted certain judicial review rights under the CSRA, but whose rights do not extend to the personnel action at issue - a letter of censure. The question is whether in granting review with respect to some personnel actions under the CSRA, Congress meant to preclude review of others.

The logic of *Fausto,* if not its holding, provides the answer. The Court rejected *Fausto's* claim because granting it would have given him greater rights than were available

under the CSRA to employees who enjoyed rights under that statute - primarily those in the competitive service. *Id.* at 449-50. As the Court expressly noted, this reasoning "assumes, of course, that competitive service employees, who *are* given review rights by Chapter 75, cannot expand those rights by resort to pre-CSRA remedies. ... Even respondent has not questioned this assumption." *Id.* at 450 n 3.

The Court's explicit assumption in *Fausto* that employees with judicial review rights under the CSRA may not obtain judicial review of personnel actions outside the bounds of the CSRA covered precisely the situation at issue here - a personnel action as to which the CSRA grants no right of review, even for employees who are otherwise granted such rights under the CSRA in other circumstances. The hypothetical in the text of *Fausto* to which the quoted footnote 3 was appended concerned an employee like Fausto obtaining judicial review for a 10-day suspension, while a competitive service employee favored with rights under the CSRA would not, because judicial review under the CSRA is available only for suspensions of more than 14 days. Id. at 449-50. The Court's assumption that the CSRA-favored employee would have no right to review of a suspension below the CSRA minimum - necessary to its analysis - strongly indicates that the CSRA-favored Graham has no right to review of a letter of censure, similarly below the CSRA minima for both major and minor adverse personnel actions.

In addition, Justice Scalia in footnote 3 of *Fausto* cited his opinion for our court in *Carducci v. Regan,* 714 F.2d 171, 17375 (D.C. Cir. 1983). That case held that judicial review was not available under the APA with respect to employment claims as to which the CSRA provided no relief to anyone, because the alleged adverse

actions were too minor. Allowing judicial review in such a case, our court explained, presented "an even more aggravated form of the problem" posed by allowing employees with claims for which the CSRA provided some relief (but not judicial review) to obtain direct judicial review, when such direct review was not even available under the CSRA for the most serious claims. *Id.* at 174. The *Fausto* Court's citation of *Carducci* strongly suggests that Graham's situation -involving an adverse personnel action as to which not even CSRA-favored employees have any rights of review - presents an even stronger case for CSRA preclusion than *Fausto.*

In light of the foregoing, it is clear that judicial review of Graham's personnel claims under *Vitarelli is* precluded by the CSRA. Granting Graham a right of direct judicial review for a letter of censure would give him greater rights than the CSRA affords for major adverse actions, for what does not even rise to the level of a minor adverse action under the CSRA. Graham tries to distinguish *Fausto* by noting that he, unlike *Fausto*, is a preference eligible employee under the CSRA, *see Pl.* Mem. Opp. Mot. Dismiss at 8, but that only gives Graham rights with respect to major adverse actions (and even there, lesser rights than Graham claims). For the sort of action at issue here, Graham is in the same boat as *Fausto* - the CSRA provides no relief and precludes other avenues of relief. *Fausto* and *Carducci* together establish that the fact that the CSRA provides no relief for lesser personnel actions cannot be dismissed as an "uninformative consequence of the limited scope of the statute." *Fausto,* 484 U.S. at 448. As we explained in *Spagnola v. Mathis,* 859 F.2d 223, 227 (D.C. Cir. 1988) (*en banc*), "it is the comprehensiveness of the statutory scheme involved, not the 'adequacy' of specific remedies thereunder, that counsels judicial abstention."

It is no answer to invoke the principle that agencies must follow their own regulations. That was, after all, the assertion in *Fausto*, and the Court held that it was trumped by the proposition that agencies cannot purport to confer rights undermining a comprehensive congressional scheme. The conclusion that the CSRA precludes employee *Vitarelli* claims in light of *Fausto* should come as no surprise; the dissent in *Fausto* expressly noted that "[i]n important respects [*Fausto's*] case is similar to *Vitarelli.*" 484 U.S. at 456 (Stevens, J., dissenting). The majority rejected the dissent's contention that allowing Fausto's claims to proceed would not be disruptive of the comprehensive CSRA scheme, because such claims "will be 'limited to those instances when the agency violates its own regulations,'" *Id.* at 451 n.5 (quoting dissent, id. at 466) - i.*e.*, claims under *Vitarelli.* Even those claims were precluded.

We hold that the CSRA precludes judicial review of Graham's claim that the FBI violated its own regulations in taking personnel action against him. The district court therefore had no subject matter jurisdiction over his *Vitarelli* claim. See *National Treasury Employees Union v. Egger,* 783 F2d 1114, 1117 (D.C. Cir. 1986) (affirming district court's dismissal for lack of subject matter jurisdiction because the CSRA precluded judicial review of minor personnel actions).

* * *

We affirm the district court's dismissal of Graham's complaint.

United States Court of Appeals

For The District Of Columbia Circuit

No. 03-5025 **September Term, 2002**

02cv0123

Gilbert M. Graham
Appellant

Filed On: August 5, 2003

v.

John D. Ashcroft, in his official capacity as
U.S. Attorney General, et al.,
Appellees

BEFORE: Sentelle, Henderson, and Garland, Circuit Judges.

ORDER

Upon consideration of the motion for summary affirmance, the response thereto, the reply, the motion for leave to file surreply, and the lodged surreply, it is

ORDERED that the motion for leave to file a surreply be granted. The Clerk is directed to file the lodged surreply. It is

FURTHER ORDERED that the motion for summary affirmance be granted in part. The merits of the parties' positions on the constitutional and Administrative Procedural Act claims are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F. 2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court

properly dismissed appellant's procedural due process claims, as appellant has no protected liberty interest under the "reputation-plus" or "stigma" theories." See O'Donnell v. Barry, 148 F. 3d 1126, 1139-42 (D.C. Cir. 1998). The court also properly dismissed appellant's equal protection claims in light of Brown v. General Services Administration, 425 U.S. 820 (1976). The court likewise correctly held that appellant has no general right of review under the Administrative Procedure Act. See, e.g., Harrison v. Bowen, 815 F. 2d 1505, 1514-16 (D.C.Cir. 1987); Carducci v. Regan, 714 F. 2d 171, 174-75 (D.C. Cir. 1983). It is

FURTHER ORDERED that the motion for summary affirmance be denied in part. The merits of the parties' positions on the claims asserted under Vitarelli v. Seaton, 359 U.S. 535 (1959), and its progeny are not so clear as to warrant summary action.

Because the court has determined that summary disposition is not in order with respect to the Vitarelli claims, the Clerk is instructed to calendar this case for presentation to a merits panel. Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until resolution of the remainder of the appeal.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: "s/_____"
Scott H. Atchue
Deputy Clerk/LD

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GILBERT M. GRAHAM

Plaintiff,

v.

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

Defendants.

FILED
NOV 20, 2002

Civil Action No. 02-1231 (ESH)

MEMORANDUM OPINION

Plaintiff Gilbert M. Graham brings this *pro se* action against the Department of Justice and the Federal Bureau of Investigation ("FBI" or "the Bureau"), alleging that the FBI took disciplinary action against him in violation of the Administrative Procedure Act ("APA"), 5 *U.S.C. § 701 et seq.*, and the Fifth Amendment of the U.S. Constitution. Plaintiff, an FBI Special Agent, contends that the Bureau, his employer, acted arbitrarily and capriciously, and violated his rights to procedural due process and equal protection when it determined that he had committed an Intelligence Oversight Board ("IOB") violation and issued a letter censuring him. Defendants have now moved to dismiss this case under Fed. R. Civ. P. 12(b) for lack of subject matter jurisdiction and for failure to state a claim. For the reasons set forth below, the Court will grant defendants' motion and dismiss plaintiff s claims.

BACKGROUND

Plaintiff is, and was at all times relevant to this litigation, employed as a Special Agent in the FBI's Washington Field Office ("WFO"). According to the complaint, plaintiff was notified on October 26, 2000, that the Bureau's Office of Professional Responsibility ("OPR") had begun to investigate an allegation that plaintiff had engaged in investigative dereliction that resulted in a violation of the IOB. (Compl. ¶ 12.) The IOB is a standing committee of the President's Foreign Intelligence Advisory Board, and is responsible for discovering and reporting intelligence activities that are unlawful or contrary to presidential orders and directives. During this investigation, plaintiff was notified of the allegations of misconduct and given the opportunity to provide a sworn statement to OPR. (Compl. Ex. 1 (Locke Letter).) Ultimately, OPR referred the matter to the Bureau's Adjudication Unit, which determined that plaintiff had failed to comply with IOB requirements. Accordingly, it was ordered that plaintiff be suspended, without pay, for three days. (Compl. ¶ 14.)

In response to these administrative actions, plaintiff submitted a letter of appeal to the Assistant Director of the FBI's Inspection Division. (Compl. 116.) On May 22, 2002, after reviewing the matter, Thomas Locke, the Deputy Director of the Inspection division, ordered that plaintiff's sanction be reduced to a letter of censure. (Compl. ¶ 17 & Ex. I (Locke letter).) Plaintiff then filed this action, asserting that the Bureau violated the APA and the Fifth Amendment in disciplining him as it did. He contends that the finding of an IOB violation is not supported by substantial evidence, and is otherwise arbitrary and capricious. *See 5 U.S.C.* § 706(2). (Compl. ¶ 23.) He further asserts that, in its investigation, the FBI violated its own internal procedural rules by not providing him a timely opportunity to submit a

mitigating statement. (Compl. ¶¶ 22, 26-27.) Finally, he alleges that the Bureau reported violations only against African American employees while not doing so against white employees; that the FBI did not allow him to offer a written explanation of his conduct while allowing white employees to do so; and that he was disciplined while white employees were not. (Compl. ¶¶ 30-32.) Through these discriminatory acts, plaintiff argues, the FBI ran afoul of the equal protection guarantee secured by the Fifth Amendment.

ANALYSIS

1. APA Claims (Counts I and II)

Plaintiff first argues that the Court has jurisdiction under the APA to review the FBI's decision to find him liable for an IOB violation and to issue a corresponding let ter of censure. Defendant responds that APA review of these actions is precluded because the Bureau's employment-related decisions have been "committed to agency discretion by law" and are therefore shielded from judicial review. *See* 5 U.S.C. § 701 (a)(2). Analyzing this issue obliges the Court to consider the workings and effect of the Civil Service Reform Act of 1978 ("CSRA"), Pub. L. 95-454, 92 Stat. *I I I I et seq.* (codified, as amended, in various sections of 5 U.S.C.). This comprehensive statute extensively overhauled the federal civil service system, "creating an elaborate 'new framework for evaluating adverse personnel action against federal employees.'" *United States v. Fausto,* 484 U.S. 439,443 (1988) (quoting *Lindahl v. OPM,* 470 U.S. 768, 774 (1985)). The CSRA prescribes the protections and remedies available to civil servants against whom adverse actions are taken, including provisions for administrative review and, under certain circumstances, judicial review of those actions *Id.*

Congress has generally exempted the FBI and its employees from the CRSA's complex procedural scheme. *See* 5 U.S.C. § 751 l(b)(8); 5 U.S.C. § 2302(a)(2)(C)(ii). However, certain FBI employees may be covered by the statute if they are "preference eligibles," a status conferred based on previous military service and which affords employees so designated preferential treatment within the CSRA system. *See* 5 U.S.C. § 7511 (b)(8); id. at § 7511(a)(1) (B); 5 U.S.C. § 2108(3); *Fausto,* **484 U.S. at 441** n. 1. Here, plaintiff maintains that he is such a preference eligible (Pl-s Opp. at 7), and - at least for the purpose of these motions - defendants has accepted this representation. (Defs.' Reply at 3 n.3.) The Court will therefore do the same and proceed on the assumption that plaintiff is a preference eligible whose employment falls within the CRSA's ambit.

Doing so decides this case, for it is clear that the Court lacks jurisdiction to hear an APA claim based on employment action that comes within the purview of the CSRA. The law is well settled that the CSRA displaces all other bases for judicial review of personnel actions taken against federal employees, including the APA. See *PItti v. Weise,* 155 F.3d 596, 600 (2d Cir. 1998); *Sculimbrene v. Reno,* 158 F. Supp.2d 1, 5-7 (D.D.C. 2001); *McGregor v. Greer,* 748 F. Supp. 881, 884 (D.D.C. 1990). This displacement can occur in one of two ways. If the personnel action is one for which the CSRA provides a mechanism for review - whether because of the nature of the action or the status of the employee - the employee is obliged to avail himself of that mechanism, and cannot circumvent the statute's comprehensive and carefully balanced remedial scheme by using the APA to proceed directly to court. *See Harrison v. Bowen,* 815 F.2d 1505, 1514-16 (D.C. Cir. 1987); *Stephens v. Dept of Health and Human Servs.,* 901 F.2d 1571, 1575-76 (11th Cir. 1990).

By contrast, if the action is one for which the CSRA provides no basis for judicial review, then Congress' decision to deny such review evinces its intent that the matter be deemed "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and therefore beyond the ken of the APA. *See Carducci v. Regan,* 714 F.2d 171, 174-75 (D.C. Cir. 1983); *see also Pathak v. Dep't of Veterans* Affairs, 274 F.3d 28, 31-32 (1st Cir. 2001) (dismissing APA claim on the grounds that "judicial review is unavailable to a federal employee who has suffered an adverse personnel action if CSRA does not provide judicial review"); cf. Fausto, 484 U.S. at 844-45 (holding that a nonpreference member of the excepted service could not use the Back Pay Act to obtain judicial review of an adverse personnel action, even though that employee had no right to administrative or judicial review under the (CSRA)[1].

In other words, then, the CSRA's exclusivity - and its preemption of the APA - applies whether or not the employee is a preference-eligible. *See Stephens*, 901 F.2d at 1575-76; *Ryon v. O'Neill,* 894 F.2d 199 (6th Cir. 1990). For even though this class of federal employees enjoys

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[1] This principle applies even where the federal employee in question is not covered by the CSRA at all. For example, in McAuliffe v. Rice, 966 F. 2d 979 (5th Cir. 1992), the Fifth Circuit held that employees of a non-appropriated instrumentality ("NAFI"), who are stautorily excluded from the provisions of the CSRA, 5 U.S.C § 2105(c), were nonetheless barred by the CSRA from bringing an APA claim challenging the NAFI's decision to terminate their employement. Thus, even if the Court's assumption were inaccurate, and then plaintiff (as an FBI agent) is in fact not covered by the CSRA, the result here would be the same: his APA claims would still be precluded. Cf. Padula v. Webster. 822 F. 2d 97, 100 (D.C. Cir. 1987)(Observing that the FBI's "employment practices have been traditionally unreviewable" - and noting in this respect that Congress has "consistently exempted the FBI from statutory schemes governing the civilk service.")

opportunities under the CSRA that other employees do not, this preference gives them no special right to challenge personnel actions based on statutes other than the CSRA. This is what plaintiff seeks here, and his bid must therefore be rejected. The CSRA's comprehensive scheme for processing and adjudicating employment disputes between federal civil servants and their employers governs this case and bars the Court from reaching the merits of plaintiff s APA claim. For this reason, the Court will grant defendant's motion to dismiss Counts I and II for lack of jurisdiction.

11. Constitutional Claims (Counts III and IV)

Although the CSRA precludes plaintiff from bringing his APA claims, his constitutional challenges to the Bureau's actions stand on a different footing. The law in this Circuit generally allows federal employees to seek equitable relief (though not to recover damages) against their employers for alleged constitutional violations, even where similar statutory claims would be barred. *See Spagnola v. Mathis,* 859 F.2d 223, 229-300 & n.12 (D.C. Cir. 1988) *(en banc)* (holding that while the CSRA precludes federal employees from bringing *Bivens* actions for damages against their employers based on minor personnel actions, the statute does not block those employees from seeking equitable relief against supervisors and agencies "in vindication of their constitutional rights"); *Padula v. Webster,* 822 F.2d 97 (D.C. Cir. 1987) (taking jurisdiction over constitutional challenge to FBI's refusal to hire homosexual agent, but not over APA claim based on same decision). Here, plaintiff has advanced two constitutional claims challenging the Bureau's actions: one based on procedural due process, and the other based on equal protection. The Court considers each seriatim.

A. Procedural Due Process (Counts III and IV)

In order to establish a violation of procedural due process, a plaintiff must first show that he was deprived of a constitutionally protected interest, *i.e.* life, liberty, or property. This case involves an alleged deprivation of plaintiff s liberty interest, based on the harm done to his reputation by the letter of censure issued against him'. (Pl.'s Opp. at 13.) This Circuit has recognized two theories under which federal employees may pursue a liberty interest claim based on adverse employment action taken against them. The first, known as "reputation-plus," consists of defamation by the government "accompanied by a discharge from government-employment or at least a demotion in rank or pay." *O'Donnell v. Barry,* 148 F.3d 1126, 1140 (D.C. Cir. 1998) (quoting *Mosrie v. Barry,* 718 F.2d It 5 1, 1161 (D.C. Cir. 1983)); *see also Paul v. Davis,* 424 U.S. 693, 709-10 (1976) (suggesting that in order to be actionable under the Due Process Clause, "the defamation had to occur in the course of the termination of employment"); cf. *Doe v. Cheney,* 885 F-2d 898, 910 (D.C. Cir. 1989) ("To succeed, [plaintiff] must make out a case that [his government employer] both altered his status and stigmatized his reputation.").

The second theory - that of "stigma" - arises from the combination of "an adverse employment action and 'a stigma or other disability arising from official action.'" *O'Donnell,* 148 F.3d at 1140 (quoting *Bd. of Regents v. Roth,* 408 U.S. 564, 573 (1972)). In such cases, the alleged liberty damage arises not from government speech, but rather from the imposition of a continuing harm associated with the employment action that either bars the individual (formally) from future government employment or that precludes him (formally or informally) from such a broad range of opportunities that it interferes with his constitutional right to

pursue his chosen career. *Kartseva v. Dept of State,* 37 F.3d 1524, 1528 (D.C. Cir. 1994); *see also Simpkins v. Shalala,* 999 F. Supp. 106, 118 (**D.D.C.** 1998). "In other words, government action precluding a litigant from future employment opportunities will infringe upon his constitutionally protected liberty interests only when that preclusion is either sufficiently formal or sufficiently broad." *Taylor v. Resolution Trust Corp.,* 56 F.3d 1497, 1506 (D.C. Cir. 1995).

Plaintiff cannot prevail on either of these theories. First, as to reputation-plus: even if the issuance of the letter of censure could be characterized as defamatory, which it cannot,[2] plaintiff has simply not suffered the kind of adverse employment action necessary to satisfy the "plus" factor. He has not been discharged or demoted. The only sanction he received was the censure letter, which resulted in neither a loss of pay nor of benefits. No other punitive measures have resulted from the 10B violation. This is not enough. *See USIA v. Krc,* 905 F.2d 389, 397 (D.C. Cir. 1990) (holding

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[2] There are at least two reasons why the filing of the letter of censure in plaintiff's personnel file does not amount to defamation. First, there is no evidence that the contents of the letter were false. See *Beeton v. District of Columbia*, 779 A.2d 918, 923 (D.C. 2001)(listing falsity as an essential element of defamation under D.C. law). Second, there is no indication that the letter was disseminated publically. See *Crowley v. N. Am. Telecomm. Ass'n*, 691 A.2d 1169, 1172 n.2 (D.C. 1997)(in order to be defamatory, a statement must be published without privilege to a third party). As defendants point out, the letter of censure was only brought to public light because plaintiff chose to file this lawsuit. As such, the letter does not amount to a public accusation "that will damage [plaintiff's] standing and associations in the community." *Doe*, 885 F. 2d 898, 910 (D.C. Cir. 1989)(finding no liberty interest infringement where agency "did not disseminate publically any information that it used in making its decision"); see also *Orange v. District of Columbia*, 59 F. 3d 1267, 1274 (D.C. Cir. 1995)(holding that "injury to reputation cannot occur in the absence of public disclosure of the allegedly damaging statements").

that plaintiff was not deprived of a liberty interest where he retained his job and his salary).

Next, as to stigma, plaintiff falls far short of showing that the letter of censure imposes any continuing harm on his employment prospects. There is no evidence that the letter interposes any barrier that would prevent plaintiff from obtaining future government employment or that his "attractiveness to potential employers" has in any way been reduced. *See id* at 398 (quoting *Perry v. FBI,* 781 F.2d 1294,1302 (7th Cir. 1986)). The censure has obviously not served as a formal impediment to plaintiffs continued employment as an FBI special agent. Nor is there any indication whatsoever that the mere presence of such a letter in plaintiffs employment file threatens to cut him off from the broad range of future job opportunities necessary to implicate a constitutional liberty interest. In the absence of such a showing, the Court concludes that no constitutionally protected liberty interest was implicated by defendants' actions. *See Orange,* 59 F.3d at 1275.

Moreover, assuming *arguendo* that plaintiff could demonstrate the deprivation of a protected interest, he still could not prevail, because it is clear that he received all of the process due to him under the Fifth Amendment. The record indicates that plaintiff was interrogated about the alleged IOB violation before any adverse action was taken, and that he was given the chance to offer a signed, sworn statement to present his version of events. (Pl.'s Opp. at 10; Def. 's Mot. to Dismiss at 4 n. 3.) He therefore received notice of the charges against him and a "meaningful opportunity" to refute those charges and to clear his name.[3]

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[3] That plaintiff was under obligation to be truthful in his statements to the FBI in no way suggests that he was deprived of due process. See

See Doe, 885 F.2d at 9 10; cf. *Erickson,* 522 U.S. at 266 ("The core of due process is the right to notice and a meaningful opportunity to be heard."). Evidence of the "meaningful" nature of plaintiff's opportunity is the fact that he successfully appealed his original three-day suspension, persuading the FBI to reduce that penalty to the letter of censure. Accordingly, the Court finds that plaintiff was afforded whatever arguable procedural protections were required by the Constitution. For these reasons, plaintiff's due process claim must be dismissed.

B. Equal Protection (Count IV)

Finally, plaintiff has alleged racial discrimination by the Bureau in its investigation of the IOB violation and in its imposition of discipline for that violation. Specifically, he contends that:(1) the FBI reported IOB violations only against African American employees, while not doing so against white employees; (2) the Bureau did not allow plaintiff to submit a written explanation of his conduct, while allowing white employees to do so; and (3) he was sanctioned for the IOB violation while white employees were not. (Compl. ¶¶ 30-32.) While, as noted above, this equal protection challenge is not precluded by the CSRA, it is foreclosed by another federal statute: Title VII

In *Brown v. General Services Administration,* 425 U.S. 820, 824-29 (1976), the Supreme Court held that Title VII serves as the exclusive channel by which federal employees may assert employment discrimination claims that would in fact be covered b y that statute. The Title VII remedy "declared exclusive for federal employees in *Brown*

LaChance v. Erickson, 522 U.S. 262, 266 (1998)(holding that a government employee's due process right to be heard does not include the right to make false statements with regard to the charged conduct).

[] precludes actions against federal officials for alleged constitutional violations as well as actions under other federal legislation." *Kizas v. Webster,* 707 F.2d 524, 542 (D.C. Cir. 1983); *see also Rochon v. FBI,* 691 F. Supp. 1548, 1555-56 (D.D.C. 1988). In other words, when a federal employee is challenging action "directly and singularly" related to discrimination in the terms and conditions of his employment, Title VII - and not the Equal Protection Clause or any other constitutional provision - provides the sole mechanism for relief *Curtis v. Mosbacher,* 1990 WL 78516, at *4 (D.D.C. March 30, 1990).

Here, plaintiff s equal protection claim alleges that the FBI discriminated against him on the basis of race when it took adverse employment action against him without taking similar action against his white co-workers. Such a claim, which is the equivalent of a race discrimination claim, falls squarely within the ambit of Title VII. In asserting it, plaintiff is unquestionably seeking "to redress the violation of rights guaranteed by the statute," and as such, Title VII provides the exclusive basis for that claim. *Davis v. Passman,* 442 U.S. 228, 247 (1979); *see also Rochon,* 691 F. Supp. at 1555-56. Defendant's motion to dismiss will therefore be granted as to Count IV.

CONCLUSION

For the reasons given above, the Court will grant defendant's motion to dismiss in its entirety. Plaintiffs cross motion for discovery will be denied. All counts will be dismissed with prejudice.

"s/_____"
ELLEN SEGAL HUVELLE
United States District Judge
Date: November 19, 2002

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-5025 **September Term, 2003**

02cv01231

Gilbert M. Graham, Appellant

Filed On: April 30, 2004

v.

John D. Ashcroft, in his official capacity as U.S. Attorney General, et al., Appellees

BEFORE: Ginsburg, Chief Judge, Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland and Roberts, Circuit Judges, and Williams, Senior Circuit Judge.

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark Langer, Clerk
BY: "s/_____"
Michael C. McGrail

To: All Divisions From: Inspection
Re: 66F-HQ-C1226188-C, 07/10/2000

Precedence: ROUTINE **Date:** 07/10/2000

To: All Divisions **Attn:** Assistant Director;
ADIC;
SAC;
Legat

From: Inspection
Office of Inspection/Inspection Management Unit
Contact: SSA Sherry Gellaty Harriss, Ext. 2516

Approved By: Thompson Wiley D III
Locke Thomas Bernard
Kaiser Kenneth W
Corvington Roland J

Drafted By: Raucci John G
Corvington Roland J

Case ID #: 66F-C-1226188-C

Title: INTELLIGENCE OVERSIGHT BOARD

Synopsis: To apprise FBI employees of their responsibility to report potential Intelligence Oversight Board (IOB) matters, to advise divisions of the details required in the notification of questionable activity, and to advise of a change in program responsibility for IOB matters within the Inspection Division (INSD).

Administrative: RE Electronic Communication (EC) from the INSD to the Information Resources Division and the National Security Division (NSD), dated 05/15/2000,

captioned as "PROPOSED CHANGE; NATIONAL FOREIGN INTELLIGENCE PROGRAM MANUAL (NFIPM)."

Details: The President, by Executive Order (EO) 12863 of 09/13/1993, established the IOB as a standing committee of the President's Foreign Intelligence Advisory Board. With respect to the FBI, the Board reviews those activities relating to foreign intelligence and counterintelligence. Such activities are conducted in accordance with the applicable EOs, Presidential Directives, rules, agreements, statutes, guidelines and investigative procedures and techniques set forth in the National Foreign Intelligence Program Manual (NFIPM).

Section 2.4 of EO 12863, mandates that Inspectors General and the General Counsel of the Intelligence Community components report to the IOB all information "concerning intelligence activities they have reason to believe may be unlawful or contrary to EOs or Presidential Directive." The INSD works cooperatively with the Office of General Counsel (OGC) to ensure that such information is reported as required.

In the past, IOB matters were administratively managed by the former Compliance Management Unit (CMU), Audit, Evaluations, and Analysis Section, INSD. During December 1998, the former Review and Analysis Unit and the CMU were merged to form the Inspection Management Unit (IMU). Revisions to the NFIPM were initiated setting forth the changes in program responsibility. This communication shall serve to notify each field office and FBIHQ division of the aforementioned change, and to remind all employees of their duty and responsibility to report potential IOB matters to the IMU.

Potential IOB matters detected by field offices, FBIHQ divisions, and Legats are to be reported to IMU, INSD, by EC within 14 days of discovery of the possible violation, with a copy of the communication directed to the OGC. The EC should be captioned with the names of the involved employees (i.e., case agent, case supervisor, and any other appropriate personnel) in the following format:

SSA JOHN K. DOE
SA JANE J. SMITH
NAME OF DIVISION
IOB MATTER

The EC must contain a complete synopsis of the possible violation and must identify by title, the substantive investigation in which the questionable activity occurred and its investigative program. The EC must identify the subject by name and asset by file number. The subject's or asset's status as a United States Person (USP) or non-USP must be provided. A reference to the controlling legal criteria or administrative requirement must be provided. As an example, "The court authorized electronic surveillance to begin at (time) on (date); or "A preliminary inquiry was initiated on (date) and expired on (date)." The EC must illustrate an explanation from the involved employees which clearly defines what occurred and sets forth the reason the potential violation occurred. The EC should also illustrate the NFIPM citation potentially violated, provide the date of the potential violation, the date the potential violation was detected, and the action taken to preclude recurrence. In instances of delayed reporting, an explanation for the delayed submission must be provided. Additionally, division head comments concerning administrative action taken or deemed appropriate must be included. For additional information regarding this topic, employees are directed to the NFIPM, Part I, 6-7.3

MAOP PART I SECTION 13
(DISCIPLINARY MATTERS)

(5) | INSD AND DRB AUTHORITY AND PROCEDURES

(a) INSD, in an appeal from a suspension of 14 days or less, and a DRB, in an appeal of a suspension of more than 14 days, demotion or dismissal, will review the issues presented in writing by the employee. The review will be of the employee's written appeal, and response submitted by OPR, and any documentary record. If the record of a disciplinary action taken under the auspices of OPR is insufficient to decide the merits of an appeal, INSD or the DRB may remand the case to OPR and direct such additional investigation and findings as may be necessary. Nothing shall preclude INSD or a DRB from requiring an oral presentation if considered helpful to a resolution of the appeal.

(b) An appeal of a suspension of 14 days or less will be decided by the designated INSD official. The decision of a DRB in an appeal of a suspension of more than 14 days, demotion or dismissal will be by majority vote.

(c) In exercising appellate authority, INSD and a DRB may independently redetermine the factual findings and/or the penalty imposed. However, in the event that a different disciplinary sanction is determined to be appropriate, that sanction must be consistent with applicable disciplinary precedent.

(d) After reaching a decision in the review of an appeal, INSD or a DRB will document its findings in writing and provide the employee a written decision.

(e) If INSD or a DRB finds that an employee has not received the procedural protections in the disciplinary process to which he/she is entitled, it may retain the matter for decision, e.g., when the matter involves harmless error, may refer the matter back to OPR for corrective action; or may reverse or modify the action of the deciding official.

(f) The decision of INSD or DRB concerning the merits of an appeal involving a non-SES employee will constitute the final decision of the FBI concerning the appropriateness of the disciplinary sanction in the matter under appeal.

(g) Decisions by the INSD or a DRB in the appeal of disciplinary sanctions will be implemented no later than 60 calendar days after the appellate decision is rendered in writing.

These procedures will not apply to matters involving an appeal of an adverse disciplinary action resulting from an employees loss of a security clearance.

The expansion of procedural entitlements in the appeal of disciplinary actions will not include the right to appeal to the MSPB. The statutory right to appeal an adverse disciplinary action to the MSPB is preserved for preference eligible employees. Existing policies governing indefinite determinations and non-adverse actions will not be affected by this expansion of appellate procedures. |

MAOP PART I SECTION 14
(APPEALS AND GRIEVANCES)

14-1 INTRODUCTION

(1) The FBI has always attempted to anticipate and avoid possible sources of employee discontent or grievances by following fair and objective policies, uniformly applied to all. To detect and solve grievances which might arise, the FBI depends upon the alertness of its supervisors and officials.

(2) The FBI is confident that its indoctrination and training programs ensure that each employee is fully aware that any grievance should be brought to the attention of their supervisor so that the matter may be discussed, expedited and resolved. All employees should be aware that their division head or Special Agent in Charge is always available for further discussion with them of any problem which cannot be handled on the supervisory level; and that any problem may brought to the Director's attention in writing, or may be presented orally to an appropriate Bureau official.

(3) Other means by which employees may present their problems include the suggestion program or contact with the inspectors who periodically inspect each division or field office. In addition, certain formal procedures exist as set out in the subsection below. |